In the Supreme Court of the United States

OCTOBER TERM, 1973
No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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DOCKET ENTRIES

No. 72-218-S in the United States District Court for the Southern District of California

BALLARD vs LAIRD

6-16-72	Fld compl for Declaratory Judgment, Injunctive relief & for Temp Restraining ord and appl for a three Judge Court.
	MADE JS-5 CARD-1SSD SUMMONS TO Mars.
	Fld affid in support of appl for temp restraining ord & prelim injunction and P&A's in support.
6-20-72	Fld temporary restraining order that pending a final decision in the above case, pltf will not be discharged from the armed services. (S)
6-22-72	IT IS ORDERED Pltf's mot for temp restraining order and prelim injunction is placed on Thursday, June 29, 1972 at 9 a.m. (S)
6-26-72	Fld affid and argument in support of extension of temp restraining order.
6-28-72	Fld Deft's opposition to extension of temporary restraining order.
6-29-72	Fld Pltf's response to opposition to extension of temporary restraining order pending a hrng on the merits.
6-29-72	HRNG MOTS: Ent ord hrng appl for Temp Restraining Ord—Order TRO cont & cause cont to 7/17/72 at 2 p.m., hrng on question of 3 Judge Panel. (S)
7-13-72	Fld Pltf's P&A's and argument in support of appl for three judge court and for injunctive relief.
	Fld affidavit in support of application for three Judge Court.
7-13-72	Fld deft's memo of P&A's in opposition to convening a three-judge dist court, with exhs attached.
7-17-72	HRNG MOTS—Ent ord mot for 3 judge panel is granted and TRO shall cont to that date. Order defts motion to dismiss denied. (S)
7-24-72	Fld notification and certificate and mailed copies. (S)
8-8-72	Fld notice of pre-trial conf in crtrm #2 on 8-28-72 at 2 p.m. Counsel notified.

8-8-72 Fld notice of hrng before a three-judge court consisting of Judge Carter, Judge Schwartz and Judge East in crtrm #2 on 9-12-72 at 2 p.m. Counsel notified.

8-28-72 HRNG MOTS—Ent ord cause cont to 9-5-72 at 2 p.m. for Pre-TRIAL hrng. (8)

9-5-72 P/T hrng; Ent ord stip; & Ord to be submitted; Cause cont to 9-12-72 at 2 p.m. for 3 judge hrng. (8)

9-11-72 Fld statement of facts.

9-12-72 Fld affid of Lt Robert C. Ballard.

9-12-72 Fld Pltf's Brief.

9-12-72 Fld Deft's mot to dissolve three-judge District Court.

9-12-72 HRNG before a three-judge court concerning the constitutionality of 10 USC 6382 and 10 USC 6401; Judges James M. Carter; Edward J. Schwartz and William G. East; IT IS ORDERED cause shall stand submitted and TRO shall cont in effect until decision is filed and if the decision is adverse the Court will consider a motion for continuance of TRO pending appeal. (C) (8) (East)

9-13-72 Fld affidavit of Robert F. Connally.

10-11-72 Fld affid in support of judgmen for Pltf Ballard.

10-25-72 Fld memo of three Judge court that a prelim injunction shall issue restraining defts from discharging the pltf from commissioned naval service, until final determination and fur ord; This memo shall stand as Court's findings of fact & conclusions of law; Counsel for pltf is requested to prepare serve and present herein appropriate ord within 15 days from date hereof; Defts are requested to file herein within 30 days from date hereof, such answer and fur issues of pltf's compit as they shall deem appropriate, else be in default. The pltf shall have 15 days from the date of service to reply; Judge Schwartz is delegated to conduct all appropriate P/T proceedings, and the final hrng is set for 1-9-72 at 2 p.m. (8) (Carter) (East) Copies mailed.

11-22-72 Fld stipulation re continuance that defts may have to & including 12-1-72 to answer, with ord thereon. (8)

12-1 -72 Fld Deft's ANSWER; T/W; memo of law & fur showing.

12-6 -72 IT IS ORDERED on the Court's own motion, the trial in the above entitled case is hereby continued from January 9, 1973, to February 20, 1973 at 9:30 a.m. (8) Notices mailed by certified mail

12-21-72 Fld pltf's reply to deft's answer.

12-22-72 Ent ord on the court's own mot, the trial in the above entitled cause is hereby cont from 2-20-73 to 2-22-73 at 9:30 a.m. (8)

2-7 -73 Fld notice of mot and mot to dissolve three-judge dist court; vacate prelim injunction and dismiss the compit herein. NOTICED FOR 2-22-73 at 9:30 a.m.

2-13-73 IT IS ORDERED on the Court's own mot, the trial in the above case is cont from 2-22-73 to 3-8-73 at 9:30 a.m. (8) Copies mailed.

3-8 -73 Fld agreed statement of facts

3-8 -73 Fld Pltf's supplemental Brief

3-8 -73 Final Hearing before a three-judge Court concerning the constitutional of 10 USC 6401; Pltfs exh 2 marked and received in evidence; Deft's exh A & B marked and received in evidence. Both sides argue. Pltf renews mot for permanent injunction; IT IS ORDERED cause shall stand submitted. (8) (Carter) (East)

4-11-73 Fld summons retnd unex for lack of instructions.

6-26-73 Fld opinion by Three Judge Court, Judges, East, Carter and Schwartz.

7-6 -73 Fld Deft's motion for new trial purs to rule 59(b) FRCP or in the alternative to amend finding purs to rule 52(b) FRCP. (Copies mld to Judges)

7-9 -73 Fld notice of motion for new trial NOTICED FOR 7-17-73 at 9:30 am; T/W affid of Captain E. R. Fink, Jagc U.S. Navy Assist Judge advocate General (Litigation & Claims)

7-16-73 Fld Pltf's opposition to motion for new trial or to amend findings.

7-17-73 Fld order and judgment.

1. Defts are permanently enjoined and restrained from mandatorily discharging Pltf Ballard solely because of passovers in grade in grade as provided for in 6382 prior to the expiration of 13 yrs of commissioned service, and
2. Pltf Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled under law as of the close of June 29, 1972 had he not been considered subject to discharge short of thirteen yrs of continuous USN commissioned service. (Carter) (East) (Schwartz) Ent 7-18-73 MADE JS-6

7-16-73 HRNG MOTS—Ent ord mot for new trial is hereby submitted to 3 judge Court (8)

8-3 -73 Fld memo of P&A's in support of defts mot for a new trial or amendment of findings.

8-14-73 Fld Deft's NOTICE OF APPEAL

8-23-73 Fld order denying motion for new trial and to amend findings of fact and conclusions of law. (Carter) (East) (8) Mailed copies to counsel

9-20-73 Fld NOTICE OF APPEAL BY DEFTS.

[Filed June 16, 1972]

United States District Court, Southern District of California

No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIF., DEFENDANTS

Complaint for declaratory judgment, injunctive relief and for temporary restraining order and application for a three judge court

Plaintiff LT. ROBERT C. BALLARD, U.S.N. alleges as follows:

IDENTIFICATION OF PARTIES

1. The plaintiff is LT. ROBERT C. BALLARD, U.S.N., who is presently attached to the Fleet Training Group, located at the Fleet Anti-Submarine Warfare School in San Diego, California.

2. Respondents are as follows:

MELVIN LAIRD is the Secretary of Defense and on information and belief he is a resident of the District of Columbia.

3. JOHN CHAFEE is the Secretary of the Navy and on information and belief he is a resident of the District of Columbia.

4. VICE ADMIRAL DAVID BAGLEY, U.S.N. is the Chief of Naval Personnel and on information and belief is a resident of the District of Columbia.

5. CAPTAIN ROBERT H. LEMMON, U.S.N. is the Commander of the Fleet Training Group (Com Fle Tra Gru) the

unit to which petitioner is presently attached, San Diego, California and on information and belief is a resident of San Diego, California.

JURISDICTION OF THE COURT OF THIS MATTER

6. This action, in part, is an action of declaratory judgment, pursuant to 28 USC Sections 2201 and 2202 for the purpose of determining questions of actual controversy between the parties as more fully set forth in the following allegations of this complaint. There is an actual justiciable controversy requiring a declaration of the rights of the parties.

7. Injunctive relief is sought pursuant to the general equity jurisdiction of this court and 28 USC Section 1331. The Federal Act under which plaintiff is being discharged from the United States Navy is unconstitutional in that its application to plaintiff deprives him of due process of law. The monetary loss to plaintiff due to this discharge in violation of due process exceeds $200,000.00.

8. This is likewise an action in the nature of mandamus, pursuant to 28 USC Section 1361, to compel defendants who are all officers and employees of the United States Government to perform duties owed to the plaintiff.

FACTUAL ALLEGATIONS

9. Plaintiff is a Lieutenant in the United States Navy and has been a commissioned officer since August 16, 1962 for a total of over nine years continuous active commissioned service. Prior to commissioning, plaintiff served seven years as an enlisted man.

10. Plaintiff has served with distinction in the United States Navy and with overall outstanding fitness reports. In all of plaintiff's fitness reports he has been recommended for promotion.

11. Despite plaintiff's outstanding service, plaintiff is presently scheduled to be discharged from the Naval Service for the sole reason that plaintiff has not been promoted to Lieutenant Commander during the nine years and 10½ months that plaintiff has been in active commissioned service. See Exhibit A attached hereto and incorporated herein.

12. Plaintiff has exhausted all administrative remedies available to him while on active duty to remain on active duty.

13. Plaintiff will be caused irreparable harm by his separation on June 30, 1972 as he will receive severance pay of not more than $15,000.00 as opposed to the $200,000.00 of benefits which would accrue to him if he were allowed to remain on active duty for approximately 2½ years from June 30, 1972.

14. If plaintiff were a female officer, plaintiff could not be discharged for failure of promotion until a total of 13 years active duty as an officer had been served. This is mandated by 10 USC Section 6401.

15. Plaintiff is being discharged under 10 USC Section 6382 despite the fact he has not served 13 years in the service as an active duty officer.

16. Plaintiff is being deprived of equal protection of the law under the Fourteenth Amendment of the United States Constitution in that plaintiff is being discharged earlier than if he were a woman officer.

17. Plaintiff alleges that were he a woman officer he would be allowed three chances at promotion vice the two chances he is allowed as a male officer.

18. Plaintiff alleges that 10 USC Section 6382 discriminates against him because of his sex when compared to 10 USC Section 6401 which applies to women and that this deprives plaintiff of a benefit solely because of his sex.

19. Plaintiff alleges that the United States Army and United States Air Force provide hearings to officers on request who are involuntarily severed due to failure of promotion.

20. Plaintiff alleges that no hearing has been offered him by the United States Navy despite his request for such hearing.

21. Plaintiff alleges that he would be able to present valuable and relevant information to a retention board concerning his value to the Navy if such a board were convened and such a retention hearing granted.

22. Plaintiff alleges that since a retention hearing is available in the Army and the Air Force, he is being denied the equal protection of the law since no such hearing is provided him in the Navy.

23. Plaintiff alleges that separation without such a hearing denied him of due process of law under the Fifth Amendment of the United States Constitution.

24. Plaintiff alleges that the Naval Service owes him the duty to retain him a minimum of 13 years active commissioned

service and that mandamus is appropriate to order such retention.

25. Plaintiff alleges that at the expiration of the 13 years active commissioned service if he has not been promoted, the United States Navy will still be required to provide him a retention hearing and that a declaration of that right is mandated by the allegations of this suit.

26. Plaintiff alleges that 10 USC Section 6382 is unconstitutional in that it deprives plaintiff of his livelihood without a hearing and without relation to his ability to perform his job.

APPLICATION FOR THREE JUDGE COURT

27. Based on the above allegations plaintiff applies for a three judge court pursuant to 28 USC Section 2282.

PRAYER FOR RELIEF

1. Plaintiff prays for a Temporary Restraining Order restraining the defendants from acting on their intention to discharge plaintiff until such time as a full and fair hearing is held in Federal District Court.

2. Plaintiff prays that at the end of the District Court proceedings, an injunction issue to prevent the discharge of plaintiff for failure of promotion until plaintiff has served at least 13 years active commissioned service and until he has received a hearing on the reason for such discharge.

3. Plaintiff prays for a declaratory judgment declaring that 10 USC 6382 is unconstitutional on its face and a further judgment that 10 USC 6382 is unconstitutional as applied to plaintiff.

4. Plaintiff prays for costs of suit and such other relief as the court may deem proper.

DATED: June 16, 1972.

CHARLES R. KHOURY, JR.,
Attorney for Plaintiff.

539-530—74——2

EXHIBIT A

DEPARTMENT OF THE NAVY,
BUREAU OF NAVAL PERSONNEL,
Washington, D.C., March 17, 1972.

From: Chief of Naval Personnel
To: Lieutenant Robert C. BALLARD, USN
Via: Commander
Fleet Training Group
San Diego
San Diego, California 92147
Subj: Resignation from the Naval Service
Ref: (a) Your ltr of 23 February 1972
(b) 10 USC 6382
(c) CHNAVPERS ltr Pers-B1603a-s-erp of 20 January 1972
(d) BUPERSMAN 1020330

1. In reference (a) you submitted your resignation from the naval service of the United States, and requested that it be accepted contingent on a Reserve appointment and continuation on active duty.

2. Reference (b) requires that officers of your category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation as indicated in reference (c).

3. You may request a Reserve appointment in accordance with reference (d). The request must be unconditional. Such appointment, if tendered, would be in an inactive status only, but would enable you to work toward retirement points.

4. Your desire to continue on active duty is appreciated and it is regretted that your request submitted in reference (a) cannot be approved.

J. B. HASKINS.
By direction

[Filed July 13, 1972]

United States District Court, Southern District of California

Civil No. 72-218-S

AFFIDAVIT

Rear Admiral B. B. Forbes, Jr., U.S. Navy, being duly sworn, deposes and says:

1. I am an officer on active duty in the United States Navy. Since March 1972 I have served as Assistant Chief for Personnel Control, Bureau of Naval Personnel. Among other things, my duties include effecting the discharge of male officers pursuant to section 6382, title 10, United States Code.

2. Two hundred and thirty-eight male lieutenants of the Regular Navy were subject to the mandatory discharge from the Navy on June 30, 1972, pursuant to the provisions of section 6382, title 10, United States Code. Thirty-one of these officers had served more than 18 years active duty on June 30, 1972, and, after discharge, they were granted commissions as active-duty officers in the United States Naval Reserve. This was done pursuant to a long-established policy within the Navy.

3. Lieutenant Robert C. Ballard, U.S. Navy, is one of the 238 officers whose discharge is required by federal statute. Nine other lieutenants of the Regular Navy, all of whom have performed an equal or longer period of active duty than Lieutenant Ballard, and all of whose records of performance are as good as or better than his, were discharged pursuant to the statutory mandate.

/s/ B. B. FORBES.

[Filed September 13, 1972]

United States District Court, Southern District of California

Civil No. 72-128-S

AFFIDAVIT OF ROBERT F. CONNALLY

Robert F. Connally, being duly sworn, deposes and says:

1. I am a civilian Federal Government employee at the Bureau of Naval Personnel, Washington, D.C. Since 1956 I

have been employed as the Special Assistant for Promotions, Promotion and Retirement Division, Bureau of Naval Personnel. In this job, my duties require me to have an understanding of the federal statutes pertaining to the promotion, discharge, and retirement of officers in the United States Navy.

2. Congress has devised a complex statutory scheme providing for the appointment, promotion, retirement, and discharge of Navy officers. (10 U.S.C. chs. 539, 541, 543 & 545 (1970).) These statutes are designed to assure that, at any given time and under any given circumstances, an appropriate number of highly qualified officers of every rank are available for the purposes of national defense and security.

3. 10 U.S.C. § 6382 (1970) was part of the Officer Personnel Act of 1947 (OPA), Public Law 80–321, 61 Statutes-at-Large 395. The OPA contemplated that, under normal conditions, officers would be promoted by a system of permanent (vice temporary) promotions, although it provided for temporary promotions in order to cope with periods of mobilization and demobilization. Under the OPA there is contemplated a normal term of service for each rank. The normal term of service prior to promotion is three years for an ensign (0–1), 3 years for a lieutenant (junior grade) (0–2), and 6 years for a lieutenant (0–3). (See 10 U.S.C. § 5768 (1970).) Under this system, therefore, an officer in the grade of lieutenant who had twice failed of selection to lieutenant commander would not normally become subject to the mandatory discharge provisions of 10 U.S.C. § 6382 (1970) until he had served 13 years as an officer (3 years as an 0–1, 3 years as an 0–2, 6 years as an 0–3, plus 1 year between selection boards after having failed of selection to 0–4 for the first time). Thus, section 6382 contemplates the same 13-year period of service prior to discharge as does section 6401.

4. 10 U.S.C. § 6401 (1970) is part of the Women's Armed Services Integration Act of 1948 (WASIA), Public Law 80–625, 62 Statutes-at-Large 356. Unlike the OPA, the WASIA is based on a system of permanent promotions, and does not provide for temporary promotions.

5. Historically, however, due to events such as the Korean War, the Vietnam War, and interminable international crises, periods of "peace" or "normalcy" have been rare, and the system of permanent promotions for male officers has never been fully implemented. Normal terms of service between promotion have been the exception rather than the rule; each of these intervals between promotion have usually been shorter due to the increased needs for male officers of every rank, and selected officers have received temporary promotions in order to fill immediate personnel requirements. This has resulted in officers being promoted to (or failing of selection to) the grade of lieutenant commander after 7-to-9 years of active duty, instead of after the normal 12 years of active duty.

6. Where a woman officer in the line of the Navy has been passed over twice for promotion to lieutenant commander, her retention on active duty does not affect the opportunity of women officers in the line in the grade of lieutenant (junior grade) to be promoted to lieutenant. Pursuant to 10 U.S.C. § 5760 (1970), the number of women officers in the line of the Navy that may be recommended for promotion to the grade of lieutenant is equal to the number of women officers in the grade of lieutenant (junior grade). Thus, all women in the grade of lieutenant (junior grade) may be recommended for promotion to the grade of lieutenant, regardless of the number of women already serving in the grade of lieutenant. However, the rule with respect to male officers is different. Pursuant to 10 U.S.C. § 5756 (1970), the number of male officers in the line of the Navy that may be recommended for promotion to the grade of lieutenant is equal to the number of vacancies existing among officers in the grade of lieutenant, plus the number of additional vacancies estimated for the next 12 months, minus the number of officers on the promotion list for that grade. Thus, the number of promotion opportunities for the grade of lieutenant would be lessened if the twice-passed-over lieutenants were allowed to continue serving in that grade. This is one reason why 10 U.S.C. § 6382 (1970) provides that each officer on the active list of the Navy (which includes officers in the line) shall be discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander for the second time.

/s/ Robert F. Connally.

[Filed December 1, 1972]

United States District Court, Southern District of California

Civil No. 72-218-S

Answer

COME NOW defendants, by and through their attorneys, Harry D. Steward, United States Attorney, and Frederick B. Holoboff, Assistant U.S. Attorney, Southern District of California, and answer the complaint herein by admitting, denying and alleging as follows:

1. Answering paragraphs 1, 2, 4, 5, 12 and 15, admit the allegations thereof.

2. Answering paragraphs 6, 7, 8, 11, 13, 22, 23, 24, 25 and 26, deny the allegations thereof.

3. Answering paragraph 3, deny that John Chafee is the Secretary of the Navy and allege that John W. Warner is the Secretary of the Navy. Except as herein denied and alleged, admit the remaining allegations thereof.

4. Answering paragraph 9, admit that plaintiff is a lieutenant in the U.S. Navy and allege that plaintiff has been a commissioned officer in the U.S. Navy since August 17, 1962, prior to which date plaintiff served on active duty as an enlisted man in the U.S. Navy for a period of 6 years, 11 months and 17 days.

5. Answering paragraph 10, deny that plaintiff has served with distinction in the U. S. Navy with overall outstanding fitness reports and admit that in all of plaintiff's fitness reports he has been recommended for promotion.

6. Answering paragraph 11, deny the allegations thereof and allege that plaintiff's discharge from the U. S. Navy be not later than June 30, 1972, is required by 10 U.S.C. § 6382 (1970) for the reason that plaintiff has twice failed of selection to the rank of lieutenant commander.

7. Answering paragraph 14, deny the allegation thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970).

8. Answering paragraph 16, deny the allegations thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970). Further answering paragraph 16, allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

9. Answering paragraph 17, deny the allegations thereof and allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

10. Answering paragraph 18, deny the allegations thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970) and further allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

11. Answering paragraph 19, are without information sufficient to form a belief with respect to the allegations thereof.

12. Answering paragraph 20, deny the allegations thereof

and allege that plaintiff was twice considered for promotion to lieutenant commander by separate boards of officers (10 U.S.C. § 5704 (1970)), each of whom was sworn to select among the eligible officers those whom the board considered "best fitted for promotion" (10 U.S.C. § 5707 (1970)). Selection of officers "best fitted for promotion" is based on their service records to which they have access at any time. Both times plaintiff failed of selection for promotion to lieutenant commander.

13. Affirmatively allege that the prohibition against plaintiff's discharge be removed or dissolved for as noted in *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 at 298 (CA 1, 1972). [T]he detriment to the Air Force in retaining officers it desires to retire [i.e., release from active duty or discharge] is at least as great as that of the officers retired. Moreover, if plaintiff ultimately prevails, he can be made whole by full compensation for back pay and restoration of full seniority rights; for these reasons, plaintiff should be denied further interlocutory relief. It should be noted that plaintiff's court-compelled continuation on active duty might have to be credited as time for retirement. It would be ironic and inequitable if plaintiff could win ultimate victory (entitlement to retirement) while losing his case on the merits.

WHEREFORE, defendants respectfully urge that the preliminary injunction heretofore issued be dissolved, that 10 U.S.C. § 6382 be declared constitutional on its face and as applied to plaintiff and for such other and further relief as to the Court may seem just and proper.

DATED this 1st day of December, 1972.

HARRY D. STEWARD,
United States Attorney,
ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division,

FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney,
Attorneys for Defendants.

[Filed December 21, 1972]

United States District Court, Southern District of California

No. Civil 72-218-S

Plaintiff's reply to defendants' answer

COMES NOW plaintiff by and through his attorney CHARLES R. KHOURY, JR. and replies to the answer herein by admitting, denying and alleging as follows:

1. Answering paragraph 3, admits that JOHN WARNER is now the Secretary of the Navy.

2. Answering paragraph 4, admits plaintiff has been a commissioned officer in the United States Navy since August 17, 1962. Plaintiff denies that he served on active duty as an enlisted man in the United States Navy for a period of six years, eleven months and seventeen days and affirmatively alleges that he was an enlisted man on continuous active duty from July 27, 1955 to August 16, 1962, a period of seven years and twenty-one days. Plaintiff further alleges that by February 20, 1973, he will have served over ten and one-half years as a commissioned officer for a total of seventeen and one-half years on active duty in the United States Navy.

3. Answering paragraph 6, denies the allegations thereof and denies further that the allegation is factual matter.

4. Answering paragraphs 7, 8, 9, 10 and 12, denies the allegations thereof.

5. Answering paragraph 13, denies the allegations thereof and further denies that it is proper factual matter.

6. Plaintiff affirmatively alleges that defendant has made no showing of compelling government interest in the discriminating effect of 10 U.S.C. §§ 6382 and 6401.

WHEREFORE, plaintiff respectfully requests that the preliminary injunction heretofore issued be made permanent, that 10 U.S.C. § 6382 be declared unconstitutional on its face and as applied to plaintiff and for such other and further relief as to the court may seem just and proper.

Dated this 18th day of December, 1972.

CHARLES R. KHOURY, JR.

[Filed March 8, 1973]

United States District Court, Southern District of California

Civil No. 72-218-S

Agreed Statement of Facts

Lt. Robert C. Ballard is a Regular Navy Lieutenant. As of June 30, 1972 he has served as an enlisted man for six years, eleven months, and seventeen days and as an officer for nine years, ten months, and fourteen days. As of March 8, 1973, his commissioned service has been increased by 251 days because the Navy has been and continues to be judicially enjoined from discharging him as required by 10 U.S.C. § 6382.

On June 30 of the year in which Lt. Ballard had failed to be promoted for the second time (1972), he was ordered discharged from the Naval Service solely due to the effect of 10 U.S.C. § 6382.

Pursuant to 10 U.S.C. § 6382, he is entitled to severance pay. If he is permitted to retire, he would be entitled to retirement pay and privileges which potentially far exceed what he would receive as severance pay.

/s/ Charles R. Khoury, Jr.,
Attorney for Plaintiff.

/s/ Frederick B. Holoboff,
Attorney for Defendants.

[Filed July 9, 1973]

United States District Court, Southern District of California

Civil No. 72-218-5

Affidavit of Captain E. R. Fink, JAGC, United States Navy, Assistant Judge Advocate General (Litigation and Claims)

Affidavit

1. There is no question but that the court's conclusion in the opinion in this case accurately notes that there are differences

between the personnel rules applicable to some Regular Navy and Marine Corps women officers and those applicable to Regular Navy and Marine Corps male officers. The court did not have before it, however, sufficient evidence to accurately assess the exact nature of these differences, the reasons for them, and exactly to which communities of officers within the naval service they apply.

The Department of the Navy is desirous of offering extensive evidence to provide the court with an analysis of the above factors, with additional information which the court should consider before a final decision is rendered concerning whether or not the differences which exist are constitutionally impermissible discrimination on the basis of sex.

Furthermore, the Department of the Navy feels that it is essential that the court be fully apprised of the nature of the statutory system of officer personnel management, and the current proposals which are under study for modifying that system. This is necessary for, if constitutionally impermissible discrimination does exist, it should be remedied in such a manner as not to disrupt the entire fabric of the officer personnel structure. In this latter regard, it is noted that there are approximately 72,000 officers on active duty in the Navy (as of November, 1971) of which only 3,233 are female. Of this latter number only approximately 167 were female officers who may become subject to 10 U.S.C. § 6401. At this same time, there were approximately 16,585 male officer lieutenants who, if the *Ballard* decision becomes final, could then be governed under 10 U.S.C. § 6401. If the differences existing between these male and female officers represent unconstitutional discrimination on the basis of sex, the remedy obviously is to bring the female officers into conformity with the larger male community. Current proposals for such modification should be made available for the court's study.

2. Historically, until World War II, the officer corps of the Navy was comprised essentially of males. Women served only as nurses prior to that time and, during World War I, women served in the Navy in administrative functions known as Yeomen "F". Women did serve in the Naval Reserve during World War II on active duty, but did not hold tenure and were not members of the Regular Navy until the "Womens Armed Services Integration Act of 1948," Act of June 12, 1948, Pub. L. No. 80-625, 62 Stat. 604. Section 6401 of Title 10, *United States*

Code, the comparative basis used by the court in this case, finds it genesis in this act.

Promotions in the Navy prior to 1862 were accomplished through the process of promoting the senior officer in the next lower grade. By the Act of July 16, 1862, ch. 183, 12 Stat. 584, officers continued to be promoted on the basis of seniority but their promotions were subject to the recommendations of a naval examining board. This system resulted in the slow advancement of young officers and in old, and sometimes senile, officers occupying the senior grades. It may be stated, generally, that the only means of separating an officer for incompetence was separation for failure to meet professional qualifications on promotion. Of course, officers could be separated by physical incapacity or could be voluntarily separated. Voluntary retirement was not available until an officer had forty years of service.

In 1916, Congress first provided a selection system within the Navy promotion system when it passed the Act of August 29, 1916, ch. 417, 39 Stat. 556. This system applied to officers serving in the grades of Captain, Commander, and Lieutenant Commander who were considered for promotion to the next higher grade. An officer whose junior was selected for promotion was considered to have "failed selection," and he was then subject to involuntary separation. This system had its shortcomings. It resulted in a high attrition rate and subsequently in reluctance on the part of selection boards to select any but the more senior officers for fear of giving a "failure of selection" to a competent officer whose junior they might otherwise have wanted to recommend for promotion. It also resulted in significant year-to-year fluctuations in both attrition rate and promotion opportunity for officers considered. These problems were addressed by the Act of June 23, 1938, ch. 598, 52 Stat. 944, in a rather unique manner. Officers in the grade of Lieutenant, Lieutenant Commander, and Commander who were considered by a selection board to be "best fitted" were promoted to the next higher grade. Officers not so recommended were subject to attrition; however, the board could designate such an officer, if he had previously failed selection as "fitted." This latter designation would entitle him to remain on active duty in his present grade for a limited period at the discretion of the President, but if he was not retained on active duty, he

was, under the law, promoted and retired. With the onset of World War II, officers were given only temporary promotions by virtue of the Act of July 24, 1941, ch. 320, 55 Stat. 603, which had as its stated purpose, "authorizing the temporary appointment or advancement of certain personnel of the Navy and Marine Corps, and for other purposes." There were no involuntary separations or retirements, except as a result of physical disability. The temporary promotion system was administered by the services substantially by regulation and without benefit of the selection board process. All of the services found that their officer corps far exceeded their requirements immediately after the cessation of hostilities. The Navy started working on this problem in the spring of 1946. The result of this effort and efforts in the other services culminated in the "Officer Personnel Act of 1947," Act of August 7, 1947, ch. 512, Pub. L. No. 80–381, 61 Stat. 795 (OPA). Although technically repealed almost in totality by the Act of August 10, 1956, ch. 104, Pub. L. No. 84–1028, 70A Stat. 1, the substantive law established by OPA remains as the statutory basis for officer promotions and nondisability separation and retirement in the naval service to this day. The Act of August 10, 1956, *supra*, merely codified the language of OPA into Title 10 of the *United States Code*. Section 6382 of that title, the section considered by the court to be discriminatory in this case, is founded in section 312(h) of OPA.

The stated purpose of OPA is "to provide for the promotion and elimination of officers of the Army, Navy, and Marine Corps, and for other purposes." The concept of OPA and related laws as they apply to promotions and attrition of officers of the grades of Lieutenant through Captain, is essentially as follows. There is a grade distribution table which permits a specified number of line officers in each officer grade, based upon the total number of line officers considered. 10 U.S.C. § 5442. (Generally, all line officers on active duty are considered, except for retired officers and certain classes of Reserve officers.) The Secretary of the Navy must establish a "prescribed number" of line officers who may serve in each grade and that number must be within the statutory grade tables. 10 U.S.C. § 5441. When an officer leaves or is removed from a grade for any reason, including promotion to a higher grade, a vacancy is created; that is, there are less officers in that grade than the

number prescribed for that grade by the Secretary, and the senior officer on a promotion list to that grade is promoted to fill the vacancy. 10 U.S.C. § 5769. Accordingly, once each year the Secretary of the Navy determines the estimated number of officer promotions that will be needed to satisfy the vacancies which are anticipated, in each grade, during the ensuing year. 10 U.S.C. § 5756. It is desirable to provide a reasonable expectancy of promotion to highly qualified officers and to preclude a loss to the Navy of highly motivated officers who would not remain with the service if promotions were stagnated. The Secretary, therefore, establishes a promotion opportunity for each grade which is reasonable yet may be less than ten percent. The promotion opportunity during recent years to the grade of Lieutenant Commander has been eighty-five percent. Essentially, this means that all lieutenants of the line of the Navy have an eighty-five-percent opportunity to be promoted to Lieutenant Commander. This opportunity is established by the creation of a promotion zone of such a size that eighty-five percent of the officers in the zone may be recommended for promotion. 10 U.S.C. § 5764. It must be recognized that above-zone or below-zone selections come from the in-zone selection opportunity, so that the actual chances for selection would be somewhat less than eighty-five percent. The promotion zone constitutes all officers who are considered for promotion for the first time under penalty of acquiring a "failure of selection" (10 U.S.C. § 5776), if not selected for promotion. [Officers who have previously "failed of selection" are considered for promotion so long as they remain on active duty but they are not included in the number of officers in the promotion zone (called above-zone). Likewise, officers may be considered for promotion who are junior to the promotion zone, and if not selected do not incur a "failure of selection" (called below-zone).]

Turning now to the involuntary separation or retirement of officers, 10 U.S.C. § 5768 sets forth what was intended to be the "normal terms of service" for line officers in each grade. It is noted that it was intended that a Captain serve thirty years, a Commander Twenty-five years, a Lieutenant Commander eighteen years, and a Lieutenant twelve years before promotion to a higher grade. This means that an officer who twice failed of selection to Rear Admiral would normally be in his thirty-first year, to Captain in his twenty-sixth year, to Commander in his nineteenth year, and to Lieutenant Commander in this thirteenth year. The law then, as now, provides that twenty years active service is necessary for voluntary retirement. 10 U.S.C. § 6323. Accordingly, retirement was contemplated for officers who reached the grade of Lieutenant Commander or above. Since officers of the grade of Lieutenant would normally not exceed thirteen years before their second failure of selection, it was provided that they would be separated but with severance pay.

Shortly after Congress passed the "Officer Personnel Act of 1947" it passed the "Womens Armed Services Integration Act of 1948" which was the source law for 10 U.S.C. § 6401, the basis for comparison in the *Ballard* case, *supra*. It was the "Womens Armed Services Integration Act of 1948" which first authorized women to serve in the Regular Navy. There is a distinction between 10 U.S.C. § 6382 and 10 U.S.C. § 6401. Under 10 U.S.C. § 6382, a male lieutenant and some female lieutenants are required to * * * be honorably discharged on June 30 of the Fiscal Year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time * * *. Under 10 U.S.C. § 6401, a woman lieutenant appointed under 10 U.S.C. § 5590 is required to "be honorably discharged on 30 June of the Fiscal Year in which—(1) she is not on a promotion list; and (2) she has completed 13 years of active commissioned service." It should be noted that a 10 U.S.C. § 5590 woman lieutenant is not guaranteed an opportunity to be considered for selection and may be discharged without having been considered for promotion to lieutenant commander. It is also noted that the "Womens Armed Services Integration Act of 1948" did provide different rules for the administration of women officers appointed under the authority of that law, although it tried to follow the same general concepts. For instance, there was no opportunity for selection of women officers to the grade of Captain; one woman officer could be detailed to be the Assistant Chief of Naval Personnel for Women (10 U.S.C. § 5743) and "while so serving" be entitled to the privileges of that grade. Also, only ten percent of the women officers of the Navy could serve in the grade of Commander and only twenty percent could serve in the grade of Lieutenant Commander. The promotional system for women, although similar to that for male officers, is separately administered. The above differences formed the basis for the separate treatment of women officers

(appointed under 10 U.S.C. § 5590) under 10 U.S.C. § 6401. The thirteen year provision and the severence pay provisions were clearly designed to treat women the same as men were treated in relation to involuntary separation. Hearings, Senate Comm. on Armed Services on S. 1527 (subsequently as S. 1641) 80th Cong., 1st Sess., p. 39 (1947). Although the promotion features in this women's law were altered in an effort to provide more nearly equal opportunity for women by the Act of November 8, 1967, Pub. L. No. 90–130, 81 Stat. 374, the provisions relating to the separation of women lieutenants were not changed.

As noted above, the laws relating to male lieutenants and female lieutenants appointed under 10 U.S.C. § 5590 were designed to provide essentially the same treatment in relation to their involuntary separation. Contrary to this effort toward equality, the laws regarding time in grade for consideration for promotion to the next grade were suspended by section 48 of the Act of August 10, 1956, *supra*.

There are forty separate categories of officers above the grade of Chief Warrant Officer–4 in the Navy, all different from the others in some respects. Some of these categories are all women; some all men; and some both men and women. For example, both male and female nurses are subject to a thirteen-year rule, 10 U.S.C. § 6396, similar to 10 U.S.C. § 6401, and female officers of some of the various staff corps, that is, not of the line, are subject to the failure-for-selection rule applicable to Lieutenant Ballard, 10 U.S.C. § 6382. The separate rules for line officers restricted from combat duties should not be applied to other categories just because there are differences between categories, for these differences are based upon personnel needs of the Navy as reflected in the law. Rather, if the court is to take corrective action, it should be to open up the restricted-to-female line category to males, and the restricted-to-male line category to females, and not to give the best features of each category to those in other categories who so request. Section 6401 applies only to Section 5590 women who are only a part of the women officers of the Navy—approximately six percent. Contrary to the court's finding, some women officers are also subject to Section 6382. There are differences in officer competitive categories, but these differences are based on different circumstances. Section 6401 originated out of the Womens Armed Services Integration Act of 1948, which was the law bringing women into the Regular Navy. At the time of its

writing there was no Regular women officer corps. This law was designed to integrate women into the Regular Navy and to treat them as nearly equally as possible with men but subject to certain necessary differences resulting from the fact that they were a new officer corps. The legislative history shows such intent. At the time of that law, men were subject to a second failure of selection at the thirteen-year point. Due to the influx of personnel ino the Navy during Korea, Vietnam, and for other reasons, the point at which a second failure of selection would occur has become much earlier as a result of the suspension of time-in-grade provisions.

The Navy and Congress have taken steps to correct differences between women categories and male categories. There was Pub. L. 90–130, and the Navy has recently had a task force make recommendations for legislative changes, most of which are now being incorporated into the "Defense Officer Personnel Management Act," presently being staffed through all the services in draft form. This makes many changes in officer personnel administration, including the elimination of the very same distinctions between men and women which are the subject of this lawsuit. It is the male line officer provisions, however, to which other categories of personnel are being conformed; female officers are being brought entirely under the provisions governing the appointment, promotion, and involuntary separation of male officers.

3. Lieutenant Ballard's opportunities for promotion within the above-described system should be clarified by evidence.

Findings of fact numbers 1 and 2 stated that Lieutenant Ballard served with distinction for seven years as an enlisted man, and for over nine years as a commissioned officer. It fails to note that Lieutenant Ballard's enlistment, his rise through the enlisted ranks, his selection for a commission, and his prior officer promotions were all obtained in a system which generally discriminated against women, although on any given isolated matter there may be discrimination in either direction. Although legislative and administrative actions have attempted from time to time to equalize the status of women in the Navy with that of men, the basic fact remains that women are denied equal opportunity to be commissioned, they have been denied equal promotional opportunities, they are presently barred from participating in the major purpose of the Navy, service on most naval vessels and on aircraft engaged in combat, 10

U.S.C. § 6015, and they have been denied selection to Rear Admiral. It was only to compensate for these distinctions that Congress favored women at this point, if, indeed, the statute does favor women. (Lieutenant Two sued because she thought the two statutes favored men, since a woman could be forced out without even having failed of selection, and because of the fact that a woman has to serve longer to gain rights to separation pay; *Two* v. *U.S.*, Civil No. 9752, W.D. Wash., Dec. 21, 1971). If Lieutenant Ballard is to prevail here, he obtains the best of both worlds.

In the discussion on page 6 of the opinion, it is noted that the court makes a point that no evidence was presented that, "having failed of selection for promotion" or "is not on a promotion list" is necessarily related to quality of service. As Lieutenant Two alleged, a woman can be forced out without having failed of selection just because her name is not on a promotion list at the end of thirteen years of commissioned service. Involuntary separation of a lieutenant without a failure of selection, is not related to the quality of service, as the court found. For Lieutenant Ballard, however, "having failed of selection for promotion" means that his record was considered with those of all other eligible lieutenants and because of an approximately eighty-five percent selection opportunity, he was deemed twice, by different boards (no one can serve on successive boards) to have been in the bottom fifteen to twenty-five or thirty percent of all lieutenants in the Navy then eligible for promotion. Surely this is directly related to the quality of his service. As a matter of fact, the court makes note that Lieutenant Ballard was recommended for promotion. His actual record as an officer contains twenty-two reports on his fitness, eight of which recommend promotion and fourteen of which make no such recommendation. This silence, while not adverse, certainly indicates that he is less qualified for promotion than the majority of his peers.

Should the *Ballard* decision become final, a seriously adverse impact would be felt by the community of young naval reservists, both male and female, currently on active duty. The court notes on page 7, that some 238 U.S. Navy lieutenants were subject to discharge on June 30, 1972. The court should also note that, in reliance on their opinion in this case, several lieutenants slated for discharge on June 30, 1973, have filed a class action and have had their discharges stayed (*Ingram*). Some 204

lieutenants are involved. The result of this action, if successful, could be to force out 630 Reserve lieutenants (junior grade)—because of fiscal restraints—who have never failed of selection and who are not entitled to separation pay. This ruling in *Ballard*, therefore, if left unchanged, takes away constitutional authority of the Executive Branch and places it in the Judiciary Branch, and leaves the Navy less able to carry out its mission. Evidence to be presented will show that the budget impact of retention of 204 lieutenants is $3.1M (based on FY '74 Presidential Budget—one Lieutenant for one year at $15,301). In order to compensate for the continued active duty of these 204 planned losses, some action must be taken to reduce expenditure. The following are the most likely possibilities:

a. The early involuntary release of 630 Reserve lieutenants (junior grade) who are expected to leave active duty during FY '74 (up to six months early) plus an early involuntary release of 204 Reserves in FY '74 who would be expected to leave during FY '75.

b. An involuntary early release of 204 Reserve officers who are not otherwise expected to leave active duty during FY '74 plus a six-month delay in all promotions to the grade of Lieutenant and Lieutenant (Junior Grade) would provide the necessary cost off-set.

If the court means, by this decision, that the entire separate status of women in the Armed Services is to be eliminated as unconstitutional, this far-reaching decision should be implemented gradually by a plan, and not haphazardly piecemeal. For instance, women officers now in service cannot match prior combat experiences of their male counterparts, and would stand little chance for selection by a selection board also considering males. If the court considers this to be the law, it should call for plans from the services, as is done in school-busing cases.

It must be noted that as of November 30, 1972, there were on active duty in the Navy, approximately the following numbers of officers:

	Male	Female
U.S. Navy	42,111	1,206
U.S. Navy (Temporary)	6,662	1
U.S. Naval Reserve	19,683	2,026

It is apparent, therefore, that of the 71,689 officers on active duty last November, only 3,233 were female. The following statistics concern the only women in the Navy who are subject to the law which Lieutenant Ballard claims discriminates against him. The figures are for December 31, 1972:

	Line	Supply Corps
Flag	0	0
Captain	10	2
Commander	41	5
Lieutenant Commander	98	2
Lieutenant	163(2)	6
Lieutenants (Junior Grade) and Ensigns	396(218)	10(9)
Totals	708	25

The figures in parenthesis are Reserve officers, who must either be selected for, and augmented to, Regular status as lieutenants or be separated. There are 167 women Regular lieutenants, total, and only a few of these at most are in Lieutenant Ballard's promotional dilemma. The court's proposed order would upset the entire, complex, promotional system of the Navy because a few female officers *may* have a particular advantage not available to Lieutenant Ballard.

/s/ E. R. Fink,
Capt JAGC USN.

[Filed August 3, 1973]

United States District Court, Southern District of California

Civil No. 72-218-S

AFFIDAVIT

Affiant, first being duly sworn, states, and alleges upon his oath, as follows, to wit:

1. I am Rear Admiral G. E. R. Kinnear, II, U.S. Navy, Assistant Chief of Naval Personnel for Plans and Programs.

BACKGROUND

2. During 100 years the Navy has evolved upon a rigorous philosophy in the development of officers: the concept of promotion or, alternately, dismissal. This "up or out" philosophy continues through today.

3. At one time nearly all officers in the Navy were identified by a unique category of naval service "eligible to command at sea." Increasing technological and scientific requirements gave rise to categories of officers whose assignment was more specialized or limited than the unrestricted line officer who was eligible to command at sea. Over the years a need for protection of the promotion opportunity in the smaller, technically oriented, or otherwise unique categories, from incursions by the larger category of officers (eligible to command at sea) was readily apparent to the Congress, and Congress responded by enacting separate requirements and protections for these smaller categories of officers.

4. The system of statutes which has evolved was based on the rules developed for the male unrestricted line officers. This category is the basis of the Navy's promotion system.

PROMOTION AND ELIMINATION OF OFFICERS

5. Promotion statutes provide for both the advancement to higher grade and the elimination of officers resulting from lack of advancement. These statutes have been developed over a long period of time and are, in general, considered reasonable. They provide for the development of high quality, dedicated naval officers. The promotion procedures applicable to male unrestricted line officers have been extended to apply to all other categories, with minor modifications. Differences do exist between categories; however, these differences exist by design in order to protect a category of officers.

6. In enunciating the rules applicable to other than male unrestricted line officers, the Congress provided parallel but distinct promotion parameters. For instance, the restricted line is guaranteed no less than the opportunity for promotion applicable to the unrestricted line. A similar but uniquely different rule applies to Staff Corps officers. These rules were developed to provide similar opportunities under law while meeting service needs in the particular category. Just as Congress applied rules to promotion opportunity so also did Congress provide for equivalent promotion flow in many categories, establishing the norms for expected promotion points in terms of years of service.

7. The procedures for processing officers from lieutenant to the next higher grade also provide for the elimination of those officers who do not advance after having been twice considered for promotion. This elimination process is not related to a desire to avoid payment of retirement benefits and is not required because of the lack of vacancies in the higher grade.

8. When viewed in isolation an officer not selected for promotion to the grade of lieutenant commander may appear to someone not familiar with the pattern of fitness reports as possessing the requisite qualification for promotion; however, to a promotion selection board that officer appeared less fitted for promotion than his contemporaries.

9. An absolute scale to measure an officer's performance is not available, and it is incorrect to presume that such a scale exists. Each officer competes with his contemporaries on his own record. Not all can or should be selected. The less well qualified are eliminated.

ROLE OF WOMEN

10. Congress was aware of the role of women in the armed services when enacting legislation providing for their management. Women are not provided equal status in the Navy. Women may not be assigned to duty on "vessels of the Navy other than hospital ships or transports" or to duty in "aircraft that are engaged in combat missions." Accordingly, women are not legally qualified for command at sea. While it is true that women have been ordered to command, there still exists a categorical difference between "command at sea" and "command."

11. Because women do not serve in a combatant ship environment or in command at sea, they are not on an equal footing for promotion with males eligible for command at sea. Norms were established for the administration of women's promotion which approximated the peacetime norms anticipated for males in the unrestricted line. That these norms have not been achieved represents the non-combatant orientation of the categories to which women are directed as compared to the more war-like categories toward which men are directed.

12. Current circumstances in the Navy find several categories of officers, male and female, who, by virtue of their category, may be released at different times. These releases are accomplished in accordance with long established custom and appro-

priate statutory provisions. Rights and benefits are established by category of service. Thus, members of one category may be entitled to certain benefits and advantages that would not apply to members of other categories. The fact that a certain category receives a certain benefit does not mean that members of other categories are discriminated against, for members of other categories are only entitled to those benefits which accrue to their category.

SUMMARY

13. Naval officers are organized into distinct categories; such as line, restricted line, Nurse Corps, etc., based upon the nature of their service. Differences in promotion and separation laws do exist between categories; however, these differences are designed to provide, to the extent possible, equitable treatment for all officers. The laws and benefits, applicable to a category are applied dispassionately. Individual officers volunteer for service in a category and are treated equally with others in the category.

/s/ G. E. R. KINNEAR, II,
Rear Admiral, U.S. Navy.

In the Supreme Court of the United States

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL.,
APPELLANTS

v.

ROBERT C. BALLARD

APPEAL from the United States District Court for the Southern District of California

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted.

FEBRUARY 19, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974